

international law governing a war had been applied, the decision of the military court would have been a different one altogether. The trial was over by December, 1945.

12. ADVISER TO THE CONSTITUENT ASSEMBLY (1946-49)

The most enduring contribution of B.N. Rau was in the Constituent Assembly. B.N. Rau was appointed as the Adviser to the Constituent Assembly in 1946. He also had a hand in moulding the foreign policy of independent India, even before India was formally declared as a Sovereign Republic. When Pandit Nehru was to reply to the debate on the 'Objectives Resolution' tabled before the Constituent Assembly on December 9, 1946, Rau suggested that Pandit Nehru might put forward the idea of remaining in the Commonwealth, even though India was to be a Republic. At that time, Rau sent a hand written note to Pandit Nehru, which read thus :

May I take the liberty of suggesting that in your reply on the 'Objectives Resolution' you might slightly amplify what you said in your opening speech about the future relations between India and England ? Something on the following lines occurs to me, but you would know best what to say :

This question has sometimes been asked, what will be the relations between the new Indian Republic and the British Community ? The answer is not difficult; in the world of today, the relations between States are not governed by labels. The U.S.A. has been a Republic for over 150 years; nevertheless, in two successive World Wars it fought on the same side as England to ward off a common peril. Ireland is treated by England as a Dominion and a member of the British Commonwealth; yet, in the last World War, Ireland remained neutral. And so these names have ceased to have much significance as regards mutual relations. The world has entered upon a new era and we have to think in new terms. We are now, all of us, part of a new World Organisation—the United Nations, units of a World Federation in the making.

A vast 'multicellular' Republic is being formed, of which the United Kingdom, the Dominions, India and all the other States of the World are, or will, in due course be, members. India's relations with the other members will necessarily be of the friendliest and closest collaboration and co-operation in the pursuit of our common ideals.¹⁸

India has, as we all know, remained in the Commonwealth even after it became a Republic.

In his discussion with foreign jurists, B.N. Rau left such a deep impression on their minds that they came to admire him. Justice Frankfurter of the Supreme Court of the United States told Girija Shanker Bajpai, at that time Secretary-General, Ministry of External Affairs :

If the President of the United States of America were to ask me to recommend a Judge of our Supreme Court on the strength of his knowledge of the history and working of the American Constitution, B.N. Rau would be the first on my list."¹⁹

B.N. Rau visited Washington, Ottawa, New-York and Dublin to study the working of the U.S.A., Canadian and the Irish Constitutions before finalising the draft of our own Constitution. During his tour, he met and discussed the constitutional problems with many distinguished jurists and statesmen. Amongst these were the Chief Justice of the Supreme Court of U.S.A., Ex-Chief Justice Hughes, Justices Frankfurter, Burton and Murphy, Boland, Irish Minister of Foreign Affairs, Justice Thorsen of Canada and Judge Learned Hand of the Federal Circuit Court of Appeals in the U.S.A. After these discussions he sent brief notes to Dr. Rajendra Prasad, the President of the Constituent Assembly on November 11, 1947 and November 19, 1947. It is interesting to note that B.N. Rau wrote in the course of his letter²⁰ of November 19, 1947:

As the result of these discussions, I have already

18. For a photostat copy of the said note in the writing of Rau, see B.N. Rau, *India's Constitution in the Making*, *supra* note 3 at p. lx.

19. *Id.* at p. xxiii.

20. Dr. Rajendra Prasad, *Correspondence and Select Documents*, Vol. 7, pp. 395-96.

proposed two amendments to our Draft Constitution. These have been explained in detail in my airgraph letter of 11-11-1947 and need only be briefly mentioned here. The first of them is designed to secure that when a law made by the State in the discharge of one of the Fundamental Duties imposed upon it by the Constitution happens to conflict with one of the Fundamental Rights guaranteed to the individual, the former should prevail over the latter. In other words, the general welfare should prevail over the individual right. Indeed, Justice Frankfurter considered that the power of the Judicial review implied in the Due Process Clause, of which there is a qualified version in section 16 of our Draft Constitution, was not only undemocratic (because it gave nine Judges a power of vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the judiciary; and Justice Hand considered that it would be a mistake to have any justiciable Fundamental Rights at all in the Constitution...

Again Justice Frankfurter was very emphatic that any jurisdiction, exercisable by the Supreme Court, should be exercised by the full Court. His view is that the highest Court of Appeal in the land should not sit in Divisions. Every Judge, except of course such Judges as may be disqualified by personal interest or otherwise from hearing particular cases, should share the responsibility for every decision of the Court.

It is a different matter that the Constitution of India has not adopted these suggestions.

Rau's proposal regarding Governors is interesting. He suggested that the Governor of a Province should be a person elected by the provincial legislature by secret vote, according to the system of proportional representation by the single transferable vote. He did not suggest the appointment of a Governor by the Central Government. He had his reasons for making the above proposal. In an unitary Constitution—and even in a federal Constitution approximating to the unitary type like that of Canada—Provincial Governors

can be appropriately appointed by the Central Government. The Cabinet Mission's Plan of May 16, 1946 did not concede the right to appoint Governors of Provinces to the Central Government. Rau thought that either the method of direct election of the Governor or the method of indirect election by the Provincial legislature, would be feasible. Of these two methods, he preferred the indirect election of the Governor, since the Governor was intended for the most part, to be a responsible head, acting on the advice of the Ministry. Rau suggested that for each Province there should be a Governor elected by the Provincial legislature by secret vote according to the system of proportional representation by the single transferable vote. This was similar to the method adopted in the case of election of the President. This could have probably kept the Central Government beyond controversy in the matter of appointment of Governors and would have avoided the various criticisms now made (sometimes not unjustifiably) as regards the appointment of Governors and as regards some of their actions. B.N. Rau also recommended that the ministers at the Provinces might be appointed by the Governor, if he so preferred, by the method of election by the Lower House according to the system of proportional representation. This was something like the Swiss type of executive. Perhaps, if it had been adopted there would have been more stability of the ministries at the Provinces and "Ayarams" and "Gayarams"^{20a} would not have taken their birth. Insertion in the Constitution of the Tenth Schedule would have been unnecessary.

As regards the appointment of judges to the Supreme Court—a subject which has now assumed some public importance—B.N. Rau suggested that every judge of the Supreme Court should be appointed by the President by warrant under his hand and seal with the approval of not less than two-thirds of the members of the Council of States. When the Constituent Assembly was functioning, its ad hoc Committee on the Supreme Court had also observed that it would not be expedient to leave the power of appointing judges

20a. The expressions used in a pungent way in Hindi to describe the "politics of defection".

of the Supreme Court to the unfettered discretion of the President. They had suggested two alternatives, both of which involved the setting up of a panel of eleven members. According to one alternative, the President in consultation with the Chief Justice of India was to nominate a person for appointment as puisne Judge and the nomination had to be confirmed by at least seven members of the panel. According to the other alternative, the panel should recommend three names, out of which the President in consultation with the Chief Justice was to select one for the appointment. The draft suggested by B.N. Rau adopted substantially the first alternative. At the same time, it utilised the Council of States for that purpose. It was to be noticed that the Council of States (as then proposed) included the Chief Justice among its members and its composition was such as to secure freedom from party bias. It was, therefore, considered that the Council of States was a satisfactory substitute for the panel recommended by the ad hoc committee on the Supreme Court. As regards the appointment of judges of the High Courts, it was suggested by B.N. Rau that the Governor with the approval of at least two thirds of the members of the Council of States could appoint them. The Council of States was brought into the picture in the case of High Court judges also, as it was felt that they were potential judges of the Supreme Court. It is true that the proposals of B.N. Rau were not accepted. But there is now a movement which is gaining ground day by day in support of a review of the provisions relating to the appointment of judges of the Supreme Court and of the High Courts.

The Indian Constitution was finally adopted on November 26, 1949.

Dr. Rajindra Prasad, who was the President of the Constituent Assembly, in his Foreword to the book *India's Constitution in the Making* by B.N. Rau, refers to B.N. Rau as a 'guide, philosopher and friend' in a task of such supreme national importance as the framing of Constitution and observes:²¹

21. Dr. Rajendra Prasad, Foreword to B.N. Rau, *India's Constitution in the Making*, *supra* note 3 at p. v.

If Dr. B.R. Ambedkar was the skilful pilot of the Constitution through all its different stages, Sri B.N. Rau was the person who visualised the plan and laid its foundation. He was superb in draftsmanship, endowed with a style which was at once clear, illuminating and precise—qualities which are indispensable in any document of legal or constitutional importance. He was not only deeply learned but careful and circumspect in regard even to the minutest details, so that any problem that he handled received full consideration from every aspect, thus eliminating, as far as possible, mistakes through misunderstanding or misinterpretation. The opinions which he gave on any controversial point that arose in the course of the discussions in the Constituent Assembly were full and judicious and based on a deep study of the subject. His services to the Constituent Assembly were highly appreciated even outside India, and the credit for preparing the framework of the Constitution of Burma goes to him in a large measure.

13. ADVISER TO GOVERNMENT OF BURMA (1947)

While B.N. Rau was still functioning as the Constitutional Adviser to the Indian Constituent Assembly, the Burmese Government sought his services in connection with the drafting of the Constitution of Burma in 1947. He gave his services unstintedly, even though, simultaneously, he had to bear the burden of the duties of the Adviser to the Constituent Assembly of India.

14. PERMANENT REPRESENTATIVE AT THE U.N.O. (1949-51)

Later, B.N. Rau was the Permanent Representative of India at the United Nations Organisation. In that capacity, he had to handle many delicate matters, such as the Jammu and Kashmir dispute and Hyderabad dispute. When India was elected as a member of the Security Council, he represented India on it and participated in discussions on a variety of issues like the Kashmir problem, problem of Italian colonies in Africa, Korea, China etc. He also functioned then as